79-143

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO.

FRANCISCO-MARTINEZ,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L. ARON PENA
PENA, McDONALD,
PRESTIA & ZIPP
P. O. Drawer 54
Edinburg, Texas 78539
512/383-5311

Attorneys for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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FRANCISCO MARTINEZ,
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VS.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Francisco Martinez, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 21, 1979.

OPINION

The Decision of the United States Court of Appeals for the Fifth Circuit on original submission, by written opinion, affirmed an order of the Trial Court (A-1), finding that Sarita, Texas, is a functional equivalent of the border so as to allow a search without probable cause, but Appellant's nervousness nevertheless provided such cause.

QUESTIONS PRESENTED

I.

That the Immigration Checkpoint on U.S. 77 near Sarita,

Texas, cannot be a functional equivalent of the border, exempting Fourth Amendment protection against unreasonable searches and seizures.

II.

That the stop, search and arrest of Petitioner did not occur at the immigration checkpoint and were not attended with reasonable suspicion.

STATEMENT OF THE CASE

Petitioner was found guilty by the trial court of the offense of possession of marihuana with intent to distribute. 21 U.S.C. 841(a)(1). His written motion to suppress the evidence, predicated upon a warrantless search of his vehicle without probable cause or reasonable suspicion, was first overruled by the court.

Petitioner had been halted on U.S. Highway 77 when looking for a roadside park. The stop, not a checkpoint, was followed by a thorough search of his vehicle. The police activity was not attended by probable cause or reasonable suspicion, and was reasoned by the patrolman on his belief that the motorist may be attempting to evade the immigration checkpoint just ahead. The motorist was a U.S. Citizen of mexican ancestry and clearly though nervously established his identity.

The Fifth Circuit Court of Appeals has agreed with the trial judge that the Sarita Checkpoint is a functional equivalent of the border, and the stop of Petitioner, though a mile away, occurred in the immediate vicinity so as not to require probable cause, reasonable suspicion, or any suspicion at all! The landmark decision of this Court in Almeida-

Sanchez only approved routine border searches at the point of entry or at established stations *near the border* located at strategic points on roads *coming from the border.* (93 S.Ct. 2535, at p. 2539). U.S. Highway 77 comes from the Rio Grande Valley, a metropolis with at least three designated SMSA's with thousands of American citizens and lawful residents.

REASONS FOR GRANTING THE WRIT

Petitioner cannot believe that the stationary immigration checkpoint at Sarita is the "functional equivalent of the border" described by this Court in Almeida-Sanchez. This would enable the police to arbitrarily stop and search millions of tourists, citizen migrant-workers, and other legal residents at a location more than 60 miles into American soil, and subject them to unreasonable searches and seizures.

In this case, the motorist traveling away from the immigration checkpoint, displayed a common appearance of the elderly and of minorities. Nervousness, unaccompanied by reasonable suspicion should not give the police the pretext to a full search of his person and vehicle.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

PENA, McDONALD, PRESTIA
& ZIPP
P. O. Box 54
Edinburg, Texas 78539
512/383-5311

BY: _____
L. Aron Pena

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon the Assistant United States Attorney, Federal Courthouse Building, Corpus Christi, Texas, by United States Mail on this the 19th day of July, 1979.

_____
L. Aron Pena

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES of America,
Plaintiff-Appellee,

v.

Francisco MARTINEZ,
Defendant-Appellant.

No. 78-5711
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit

June 21, 1979.

Defendant was convicted in the United States District Court for the Southern District of Texas, Owen D. Cox, J., of possession of 293 pounds of marijuana with intent to distribute, and he appealed. The Court of Appeals held that: (1) border patrol officer lawfully stopped defendant's car and factual circumstances gave border patrol officer probable cause to search trunk of defendant's car; (2) presumption that judge as trier of fact relies only on properly admitted testimony was not rebutted, and (3) district court did not inject personal testimony in case against defendant.

Affirmed.

*Rule 18, 5 Cir.: *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part 1.

1. Customs Duties 126

Because Sarita, Texas, is functional equivalent of border, probable cause to stop and search vehicles at checkpoint is not necessary.

2. Customs Duties 126

Where circumstances support officer's belief that motorist is trying to evade Sarita, Texas, checkpoint, stop which does not physically occur right at checkpoint is permissible since stop begins at checkpoint, although its accomplishment is delayed by suspect's running away.

3. Customs Duties 126

Border patrol officer had probable cause to search trunk of defendant's car where officer observed defendant drive to within 200 yards of Sarita, Texas, border patrol checkpoint and turn around and, when stopped by officer, defendant seemed very nervous.

4. Criminal Law 260.11(2)

Although prosecutor said something that may have been taken as statements of fact, presumption that judge as trier of fact relied only on properly admitted testimony was not rebutted in prosecution for possession of 293 pounds of marijuana with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. § 841(a)(1).

5. Criminal Law 656(1)

In prosecution for possession of 293 pounds of marijuana

with intent to distribute, district court did not inject personal testimony in case by commenting on geography of area in vicinity of Sarita, Texas, checkpoint since court had already taken judicial notice of checkpoint's characteristics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

After a non-jury trial, in which his motion to suppress was denied, Francisco Martinez was found guilty of possession of 293 pounds of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). On appeal, Martinez contends that the District Court erred by: (1) concluding that the factual circumstances gave the Border Patrol Officer probable cause to search the trunk of the appellant's car; (2) concluding that the Border Patrol Officer lawfully stopped the appellant in his car; (3) receiving unsworn testimony from the prosecutor during the appellant's trial; and (4) injecting personal testimony in the case against the appellant. Finding no merit in the appellant's contentions, we affirm.

At approximately 1:45 A.M. on March 18, 1978, Border Patrol Officer Hill saw the appellant drive to within 200 yards of the Sarita, Texas, Border Patrol checkpoint and then turn around so as to travel southbound and not continue his northbound movement to the checkpoint. Officer hill gave chase and stopped the appellant within a mile. The appellant

identified himself as an American citizen and stated that the reason he turned around was because he had just come up the road too far. Officer Hill noticed that the appellant seemed very nervous, and he asked the appellant to open the trunk of his car. The appellant said that he would rather not and would prefer to walk away. Officer Hill then asked him what was in the trunk, and the appellant replied, "I think you have a pretty good idea." Officer Hill opened the trunk and found 293 pounds of marijuana.

[1-3] Because Sarita is the functional equivalent of the border, probable cause to stop and search vehicles at the checkpoint is not necessary. *United States v. Bender,* 588 F. 2d 200, 201 (5th Cir. 1979); *United States v. Clay*, 581 F.2d 1190, 1192-93 (5th Cir. 1978). Where, as here, the circumstances support the officer's belief that a motorist is trying to evade the checkpoint, a stop which does not physically occur right at the checkpoint is permissible since the stop begins at the checkpoint, although its accomplishment is delayed by the suspect's running away. *United States v. Torres*, 590 F.2d 156 (5th Cir. 1979); *United States v. Fontecha,* 576 F.2d 601 (5th Circ. 1978); *United States v. Macias,* 546 F. 2d 58 (5th Cir. 1977). Officer Hill's prior suspicions were enhanced by the appellant's extreme nervousness and failure adequately to explain the abrupt U-turn. The appellant's responses to Officer Hill's inquiries concerning the contents of the trunk combined with the appellant's nervousness and attempted evasiveness yielded the probable cause necessary for the search of the trunk. *Id.* The determination of the District Court not to suppress the evidence was proper.

[4] The appellant next contends that the District Court erred by receiving into evidence unsworn testimony from the prosecutor. While it may be that the prosecutor said some things that may have been taken as statements of fact, the

District Court specified that it was not interested in hearing the facts from the attorneys. The presumption that the judge as trier of fact relied only on properly admitted testimony is not rebutted in this case. *See United States v. Schechter,* 475 F.2d 1099, 1101 n. 3 (5th Cir.), *cert. denied,* 414 U.S. 825, 94 S.Ct. 127, 38 L.Ed.2d 58 (1973); *United States v. Dillon*, 436 F.2d 1093, 1095 (5th Cir. 1971).

[5] The appellant's last contention is equally unfounded, for the District Court only observed that the question asked by defense counsel of Officer Hill had already been answered. Further, the District Court's comments regarding the geography of the area in the vicinity of the Sarita checkpoint were harmless, because the Court had already taken judicial notice of the checkpoint's characteristics.

AFFIRMED.